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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1336

AARON WILLIAMS,

Petitioner,

v.

TEXAS FARM PRODUCTS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

There was no written opinion of the district court, the 145th Judicial District Court of Nacogdoches County, Texas. The Judgment of the trial court, certified to this Court by Petitioner as a part of the record, appears at pages 14 to 22 of the Transcript (herein "Tr"). The opinion of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas (herein called "Court of Civil Appeals") is reported

at 406 S.W. 2d 256 and is reprinted in the Appendix to the Petition at pages 35 to 46. There was no written opinion of the Texas Supreme Court. The order of the Texas Supreme Court refusing Petitioner's "Application for Writ of Error" (with the docket notation "Refused. No Reversible Error") is printed in the Appendix to the Petition at pages 67 to 68.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Court of Civil Appeals erred, considering the testimony and jury findings in the trial court, in its ruling that Petitioner was a "helper" as defined by the Interstate Commerce Commission and as such was exempt as a matter of law under section 13(b)(1) of the Fair Labor Standards Act, as amended, from the mandatory overtime pay requirements specified by section 7 of that Act.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Fair Labor Standards Act (herein called "FLSA"), 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§201 *et seq.* (1964), namely section 13(b)(1), are set forth on pages 4 and 5 of the Petition, and the applicable portion of the Motor Carrier Act of 1935, 49 Stat. 546 (1935), as amended, 49 U.S.C. §304(a) (1964), namely section 204(a), is set forth on pages 5 and 6 of the Petition. Relevant portions of a report of the Interstate Commerce

Commission (herein called "ICC") namely *Ex parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 M.C.C. 125 (1941), are set out in the Appendix to the Petition at pages 48 to 62.

STATEMENT

A brief statement is required, in our opinion, by several inaccuracies in the "Statement" which appears at pages 6 to 19 of the Petition. Since the statement of the case made by the Court of Civil Appeals in its opinion at 406 S.W. 2d 256 (and reprinted at pages 35 to 46 of the Petition) is concise and accurate, Respondent adopts that statement and deems it sufficient to point out here the following inaccuracies in Petitioner's Statement:

1. A portion of Petitioner's statement is in fact found on page 3 of the Petition in his recital of the Question Presented. The question is posited on the stated supposition that the employee in question "regularly merely rides in a truck doing interstate hauling, for the purpose of being available to unload the truck when it reaches its destination * * * ." (This same assumption is made on page 17 of the Petition.) The jury in the trial court found: That Petitioner "rode across a state line in a truck owned by the * * * [Respondent] hauling it's [*sic*] property in the scope of his employment as a driver's helper for the company." (Answer to Special Issue No. 1, Tr. pages 15, 19); that Petitioner "made such trips across state lines * * * regularly or repeatedly as distinguished from only in isolated instances" (Answer to Special Issue No. 2, Tr. pages 16, 19); and that in

connection with his employment, Petitioner engaged in such activities as "directing driver [*sic*] into loading docks" and "loading trucks." (Answers to Special Issue No. 8, Tr. pages 17-18, 20). Neither the jury nor the trial court found that Petitioner "merely" rode in the truck "for the purpose of being available to unload" it, and Respondent denies the validity of this supposition.

Petitioner also states in the Question Presented on page 3 of the Petition that "* * * there is no finding, and it is not established by the evidence, that he [Petitioner] engaged in or that his duties included any of the activities of 'helpers' (or others) which the Interstate Commerce Commission has found to affect directly safety of operation of the vehicle * * * *." In this supposition, Petitioner assumes the answer to the point in issue in this suit. It was the very ruling of the Court of Civil Appeals that the Respondent's "activities as found by the jury were within the Commission's definition of 'helper.'" 406 S.W. 2d at 262; Petition, page 46. Until the advent of this Petition, Petitioner had at no time raised any issue as to the insufficiency of the evidence in the case.

In the last clause of the "Question Presented" on page 4 of the Petition it is stated that "* * * the findings and evidence establish that if any such activities [of helpers] were engaged in the same were so trivial, casual, and insignificant as to be de minimis." There was no such finding by the jury, and the Court of Civil Appeals ruled that the findings and evidence did establish that Petitioner was a "helper" as defined by the ICC.

2. The recitation of the extent of Petitioner's engagement in loading and returning merchandise in interstate commerce as set out on page 11 of the Petition is inaccurate. Testimony showed that there were *4* instances at least (Statement of Facts (herein "SF") pages 80, 198) when molasses was picked up; that the trucks were equipped with *inflatable rubber bags* into which the molasses was pumped (SF pages 80, 135), and that the bags had to be strapped down tight, by Petitioner, to keep them and the truck from swaying and the truck from turning over (SF pages 80, 135, 196-97, 203-04). Moreover, it is impossible to tell from the record how many trips total there were on which items were picked up for return (SF pages 23-24, 79-81, 133-34, 197-98), but even Petitioner testified that they got "one or two pick-ups a week" (SF page 134).

3. The recitations of testimony at page 12 of the Petition concerning Petitioner's duties in directing drivers into loading docks while employed as a driver's helper on trips in interstate commerce reflect incomplete portions of the total evidence presented on this point. One of the drivers with whom Petitioner rode as a driver's helper stated that Petitioner directed him in backing up to docks at all stops that were made on two interstate trips. (SF pages 197-200) Assistance in backing was required because many of the stops were on the driver's blind side. (SF pages 195, 201) Finally the jury in the trial court found that Petitioner engaged in the activity of directing drivers backing into loading docks. (Tr. pages 17, 20)

4. The testimony of the witness Moorman presented at page 12 of the Petition was properly excluded by the trial court (except in a Bill of Exceptions after the jury retired) on the ground that it had no bearing on Petitioner's case. (SF pages 138-141) Petitioner has now waived any right to object to this exclusion by his failure to raise the issue on appeal in the state appellate courts.

5. In restating the jury findings to special issues on pages 12 and 13 of the Petition, Petitioner significantly fails to set forth the complete finding in Special Issue No. 1. That Special Issue read:

> "Do you find from a preponderance of the evidence that the plaintiff, Aron [*sic*] Williams, ever rode across a state line in a truck owned by the defendant hauling it's [*sic*] property in the scope of his employment as a driver's helper for the company? (Tr. pages 15-16)

The jury answered "Yes." (Tr. page 19)

Petitioner's statement that the first seven issues "were designed to present the question of interstate commerce, to establish the basic FLSA coverage" is pure conjecture, unsupported anywhere in the record. It was stipulated prior to commencement of the trial by counsel for both parties that "at all times material to this suit * * * [Respondent] produced goods for commerce within the meaning of the Fair Labor Standards Act of 1938, as amended"; that Respondent "at all times material to this suit was and is engaged in commerce within the meaning of the Fair Labor Standards Act of 1938, as amended"; that Respondent "produced by manufacturing or jobbing, goods which were regularly and

frequently shipped in interstate commerce at all times material to this suit * * *," and that Petitioner "was an employee of the * * * [Respondent] at all times material to this suit." (SF pages 9-10) See 406 S.W. 2d at 262; Petition, page 46.

6. The "omitted issue" materials on pages 15 to 17 of the Petition are not statements of fact, and that argument, as to Texas state law, was not recognized as controlling by the Texas Supreme Court, since that Court refused Petitioner's Application for Writ of Error. (Petition, page 67) (Petitioner did make a similar argument to the Texas Supreme Court. "Petitioner's Reply to Respondent's Answer," pages 4-5, 13-14.)

7. The summary of Petitioner's assumptions as to relevant facts on pages 17 and 18 of the Petition does not accurately reflect the facts presented by the testimony or found by the jury for the reasons stated in the preceding paragraphs of this Brief.

ARGUMENT

This case involves a routine decision construing section 13(b)(1) of the Fair Labor Standards Act on a basically factual question, the legal implications of which have been resolutely settled for two decades. The result in this case is consistent with previous decisions by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit and is in total harmony with the long-standing findings and determinations by the ICC on this subject. The smoke-screen type factual arguments now urged

by Petitioner only serve to dwarf to insignificance whatever legal principles of general import may be arguably erected from this case.

Whatever other statements Petitioner made on the witness stand, Petitioner testified and a jury so found from a preponderance of the evidence that Petitioner rode across state lines regularly in one of Respondent's trucks in the scope of his employment as a driver's helper and that he engaged in such activities as directing drivers who were backing into loading docks and in loading trucks in interstate commerce. (Tr. pages 15-20) The jury then also found that these activities did not substantially affect the safety of operation of the trucks. (Tr. pages 18, 20) Respondent by its Motion For Instructed Verdict (Tr. page 8) had urged prior to submission to the jury that the testimony alone established that Petitioner was a driver's "helper" as defined by the ICC, was therefore subject to its jurisdiction, and hence was exempt from the overtime pay provisions of the FLSA under section 13(b)(1) of that Act. After the jury verdict Respondent again urged that Petitioner was subject to the exemption afforded by section 13(b)(1) of the FLSA and in effect that the jury finding that his activities did not affect safety of operation was not a proper question for the jury's determination. (Tr. page 23 *et seq.*). That finding infringed upon the ICC's jurisdiction and long-standing finding that driver's helpers *did* substantially affect the safety of operation of motor vehicles.

The Court of Civil Appeals agreed with Respondent that the case in its present posture established as a matter of law

that Petitioner was a driver's helper and subject to ICC jurisdiction. The Texas Supreme Court refused to overrule that holding. Petitioner now asks, however, that this Court review all the facts and evidence in this particular dispute and to declare that two state appellate courts made errors in ruling as they did on the evidence and jury findings presented.

Respondent submits that this is not a case which merits the attention of the United States Supreme Court.

A. *The Court of Civil Appeals Was Correct in Ruling That Petitioner Was Exempt Under Section 13(b)(1) of the Fair Labor Standards Act.*

The Court of Civil Appeals, contrary to the version of its ruling printed at page 19 of the Petition, held that a man found by a jury to ride repeatedly in trucks in interstate commerce in the course of his employment as a driver's helper and also in such employment to have assisted in directing drivers backing into loading docks and to have assisted in loading trucks, was a driver's "helper" as defined by the ICC and was subject to ICC jurisdiction. From this ruling the Court of Civil Appeals then simply applied the exemption required by section 13(b) (1) FLSA and excluded Petitioner from the benefits of section 7 of that Act. 406 S.W. 2d at 262; Petition, pages 45-46. Proof of the propriety of this holding requires only a short history of the 13(b) (1) exemption.

In 1935, Congress passed the Motor Carrier Act of 1935, which was Part II of the Interstate Commerce Act, 49 Stat.

543 (1935), 49 U.S.C. §§ 301 *et seq.* The purpose of the Motor Carrier Act was to promote the safety of operation of interstate carriers and to do away with the many conflicting and confusing state laws which surrounded carriers at that time. *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947). To enforce these safety provisions, section 204(a)(3) of the Act gave the ICC the power to establish reasonable regulations with respect to qualifications and maximum hours of service of certain employees and safety of operation of equipment. 49 Stat. 546 (1938), as amended, 49 U.S.C. § 304(a)(3) (1964).

In 1938, Congress passed the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201. Section 7 of that Act, the basis of Petitioner's cause of action, provides for mandatory rates of pay for employees when in overtime work, as defined by the Act. To avoid conflicts between the prior authority of the ICC to regulate hours and qualifications of certain motor carrier employees under the Motor Carrier Act of 1935 and the compulsory overtime pay requirements thus required for all employees subject to the FLSA, Congress enacted as a part of the FLSA the exemption set forth in section 13(b)(1), which, as amended, 29 U.S.C. § 213(b)(1) (1964), provides as follows:

> (b) The provisions of section 7 of this title [the FLSA] shall not apply with respect to—
>
> (1) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of Title 49 * * * [§ 204 of the Motor Carrier Act of 1935].

This court subsequently held, in *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943) in an interpretation of section 13(b)(1) of the FLSA, that the ICC's mere possession of the power to regulate certain employees, whether or not exercised, necessarily exempted all such employees from the compulsory overtime provisions of section 7 of that Act. Thus, if an employee fell within a category of employees subject to the ICC's jurisdiction, he was automatically excluded under the section 13(b)(1) exemption from the overtime provisions of section 7. This Court has also ruled that that power could be exercised by the ICC only with respect "to those employees whose activities affect the safety of operation." *United States v. American Trucking Ass'n.*, 310 U.S. 534, 553 (1940).

In 1941 the ICC issued a report defining the categories of employees of interstate motor carriers, other than truck drivers, whose activities were determined by it to affect directly the safety of operations of motor vehicles and over which, as a result, the ICC had the power to establish qualifications and maximum hours of service. *Ex parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 M.C.C. 125 (1941). The power of the ICC to assert its jurisdiction in this manner and the validity of the determinations in *Ex parte No. MC-2, supra*, have been specifically and emphatically upheld by this Court on at least three prior occasions. See *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947); *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695 (1947); *Morris v. McComb*, 332 U.S. 422 (1947).

In *Ex parte No. MC-2, supra,* the ICC determined that the category of employees it defined as "helpers," directly affected the safety of operation of interstate vehicles, and therefore, such "helpers" were within the ICC's jurisdiction. 28 M.C.C. at 139; Petition, page 61. The ICC defined "helpers" simply as "men * * * who ride on the vehicle, but do not drive." 28 M.C.C. at 135; Petition, page 59. After setting out examples of the types of safety-affecting work a "helper" *might* perform from time to time (which Petitioner erroneously argues they *must* do, on pages 28 and 29 of the Petition), the ICC went on to note two types of "helpers," namely guards and conductorettes, which do not customarily do such types of work but who ride on the vehicle, are available to help in the case of an emergency, and who are therefore to be classified as "helpers." 28 M.C.C. at 136; Petition, page 60. As to all of such persons who ride on the interstate vehicle as a part of their employment, the ICC concluded:

* * * *

> We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continual controversy. *They will be included in the category of helpers.* 28 M.C.C. at 136; Petition, page 60. (Emphasis added.)

* * * *

> We further find that the term "helpers" as used herein includes all employees, other than the drivers, who are required to ride on a motor vehicle when it is being

operated in interstate or foreign commerce. Finding of Fact #3, 28 M.C.C. at 139; Petition, page 61.

Under the evidence and the jury findings in this case, there is not a shred of doubt that Petitioner was employed as a "helper" as defined by the ICC in *Ex parte No. MC-2, supra.*[1]

Despite this patent conclusion, Petitioner now urges this Court to rule that a state court jury can shunt aside the express findings of a specialized federal administrative agency and substitute the jury's own concept, without benefit of definitions by the court, of what does and what does

[1] The jury in the trial court found Petitioner to be within that definition by its answers to Special Issues Nos. 1, 2, 7, 8(a), and 8(h), which Special Issues, as answered, established that Petitioner "was required" "in the scope of his employment as a driver's helper" to ride "regularly or repeatedly" in Respondent's trucks in interstate commerce and to perform such activities as "directing driver [*sic*] backing into loading docks" and "loading trucks." (Tr. pages 15-20) Furthermore, the evidence in the trial court proved that Petitioner while in Respondent's employment regularly was employed as a driver's helper on Respondent's trucks making deliveries and that at least 50% of the deliveries were in interstate commerce. (SF pages 12-21, 74, 192-205) Testimony further showed that while in the course of such employment Petitioner performed the following duties:

1. Riding with one of Respondent's drivers on his deliveries and pickups in interstate commerce. (SF pages 13-21, 193-95, 198-200)
2. Helping various drivers unload trucks once the destination was reached. (SF pages 21, 203)
3. Directing and guiding drivers in their backing of the large trucks and trailers in and out of customers' driveways for the purpose of unloading. (SF pages 121-122, 195, 202-203)
4. Assisting in the loading of merchandise returned from out-of-state to Respondent. (SF pages 133-37)
5. Assisting in loading truck loads of molasses and helping to secure such loads to the trailer bed. (SF pages 79-80, 135, 198)

Moreover, Petitioner was constantly available to meet and help the driver cope with the very safety-affecting emergencies with which the ICC was concerned. 28 M.C.C. 135-36; Petition, pages 59-60. To argue that Petitioner is not a driver's helper because such emergencies never arose while he was employed to ride in the truck (Petition, pages 10 and 18) is specious, at best.

not directly affect safety of operation of vehicles in interstate commerce. In so asserting, Petitioner is asking this Court to rule contrary to the long-established holdings on this question by this Court and the United States Court of Appeals for the Fifth Circuit in the following cases:

Levinson v. Spector Motor Service, 330 U.S. 649 (1947), stating:

> We have set forth the Commission's record of supervision over this field of safety of operation to demonstrate not only the extent to which the Commission serves Congress in safeguarding the public with respect to qualifications, maximum hours of service, safety of operation and equipment of interstate motor carriers, but to demonstrate the high degree of its competence in this specialized field which justifies reliance upon its findings, conclusions and recommendations. 330 U.S. at 676.

Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695 (1947), stating:

> It will remain for the District Court to apply the facts found by it as to the activities of the respective respondents to the classifications of work that have been made by the Interstate Commerce Commission, defining what comes within the jurisdiction of the Commission under Section 204 of the Motor Carrier Act. 330 U.S. at 706.

and later:

> *The special knowledge and experience required to determine what classifications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process.*

> The District Court, in applying section 204 of the Motor Carrier Act to respondents, will determine whether or not the activities of each respondent, either as a whole or in substantial part, come within the Commission's definition of the work of a 'loader' * * *. 330 U.S. at 707-08. (Emphasis added.)
>
> *Opelika Royal Crown Bottling Co. v. Goldberg*, 299 F. 2d 37 (5th Cir. 1962), stating with respect to the ICC conclusion that *all* employees required to ride with drivers in interstate commerce are "helpers": "We feel that this finding by the Commission is determinative * * *." 299 F. 2d at 43.

On the basis of these authorities, the Court of Civil Appeals was correct in recognizing that the proper role of the jury in this case was limited to determining whether or not Petitioner fell "within the Commission's definition of 'helpers.'" 406 S.W.2d at 262; Petition, page 45.

Petitioner claims at various points that the Court of Civil Appeals failed to apply a so-called "de minimis" rule to his case. See pages 18, 19, 24-27, 30, 33 of the Petition. Thus Petitioner argues that his activities of the nature of those cited by the ICC as being typical duties of a "helper" were too trivial, casual, or occasional a part of his employment to put him within the category of "helpers." In so doing, Petitioner conveniently overlooks the exact findings of the jury[2] and the unmistakable language of the ICC in *Ex parte No. MC-2, supra.*

The primary authority for Petitioner's theory is the case of *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695 (1947), which he quotes in part at page 23 of the Petition.

[2] See Note 1 *supra*, page 13.

However, Petitioner neglects to point out that the Supreme Court in that case specifically reserved making a decision as to the jurisdiction of the ICC with respect to part-time employees who did not devote full time to the types of activities the ICC had defined as safety-affecting. *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. at 708-09. In a case later that year, this Court provided that answer: It is the character of the activities of the employees, and not the amount of time spent in those activities, that determines whether such employees come under the jurisdiction of the ICC. *Morris v. McComb*, 332 U.S. 422 (1947). Thus, in *Morris* even drivers who spent only an average of 24 minutes out of a 10 hour day in duties involving interstate commerce were held to be exempt under section 13(b)(1). See also *Bumgarner v. Joe Brown Company, Inc.*, ... F. 2d .... (10th Cir. 1967), for the most recent Court of Appeals decision following *Morris* on this point.

In contrast, Petitioner asks that his contacts with the "safety-affecting" duties of "helpers" be declared to be too "trivial" for him to be a "helper," even though the jury found that he *rode regularly* in interstate commerce in the scope of his employment as a driver's helper, which is the crux of the ICC's definition of a "helper," and that he assisted in loading and in directing drivers backing into loading docks. Obviously the "character" of his duties, as established in the testimony and as found by the jury, was of the type of duties ascribed by the ICC to "helpers," and clearly the jury did not find that Petitioner's "helper" type activities were "trivial" or "occasional" in any respect but rather found that they were "regular" and "repeated."

B. *There Is No Conflict Between the Lower Court Decision and Other Federal Decisions.*

Petitioner asserts on pages 20 and 30 of the Petition a conflict between the decision of the Court of Civil Appeals and that of the Supreme Court in *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695 (1947). He also claims "many" courts of appeal decisions to be to the contrary, though citing only two. (Petition, page 20)

Pyramid Motor Freight Corp., supra, a "loaders" case under section 13(b)(1) of the FLSA, not only does not support Petitioner's claims, but it is the very authority behind the Court of Civil Appeals in its reliance on the ICC definitions concerning the types of safety-affecting duties which bring employees under ICC jurisdiction. The language of the Court, as partially quoted at the bottom of page 23 of the Petition, only shows the importance that this Court has attached to those ICC determinations (particularly the words Petitioner did not italicize, "according to the Commission").[3] Consistent with that case, the Court of Civil Appeals has attached a like amount of importance to the ICC definition of "helper."

[3] In addition to the emphatic language from *Pyramid Motor Freight Corp.* already quoted in this Brief, the Court there made the following reply to a contention that that situation should be referred to the ICC for a determination of whether the employees involved were within its jurisdiction:

> The Commission has done its work. The District Court must determine simply whether or not the respective employees who seek to recover overtime compensation under §7 are excluded from the benefits of that Section because they are within the above classification [of loaders]. 330 U.S. at 707.

Petitioner quotes other language in *Pyramid Motor Freight Corp., supra,* to the effect that an individual *may* have such occasional or sporadic contacts with the duties of "loaders," as established by the ICC, that such person may not be classified as a "loader." (See partial quotations on page 23 of the Petition.) From this language Petitioner improperly concludes (page 30) that *he* had no activities of a kind similar to those described by the ICC in its definition of "helpers." Again, Petitioner is relying on a faulty interpretation of the plain meaning of the ICC's rulings on "helpers" in *Ex parte No. MC-2, supra,* and is, in similar fashion, arguing solely from portions of his own testimony and overlooking other portions of it and the jury findings which clearly place him in the "helper" category.

Yellow Transit Freight Lines, Inc. v. Balven, 320 F. 2d 495 (8th Cir. 1963), which is one of the two cases said to be contrary to the lower court decision, deals with an assistant dock foreman who supervised in part the loading of trucks. This type of worker was *not* found by the ICC, in *Ex parte No. MC-2, supra,* to have safety-affecting duties, and there was no claim advanced in that case that *any* ICC ruling was involved. Hence it was left for the court to fashion its own standards to determine if Balven's duties were safety-affecting, and on the evidence, the court simply found they were not. That situation is hardly comparable to the present one where there has been an express ruling by the ICC that Petitioner's type of workers substantially affects safety of operation of interstate motor vehicles.

The case of *Wirtz v. C & P Shoe Corp.*, 336 F. 2d 21 (5th Cir. 1964), is similarly inapplicable, since it involved a situation where employees who were hired as warehousemen and who almost always performed duties of warehousemen, *very occasionally* rode on trucks to help unload. 336 F. 2d at 29, n.8. In contrast, Petitioner was hired as a driver's helper and the jury found that he did ride on the truck "regularly" as a "driver's helper." Obviously *Wirtz* is the type of case where a "de minimis" rule can have some meaning and the present case is not.

C. *There Is No Conflict Between the Lower Court Decision and the Applicable Rulings of Federal Administrative Agencies.*

Petitioner asks that this Court grant a writ of certiorari because the lower court decision is said to conflict with ICC rulings and the official interpretations of the Administrator of the Wage and Hour Division of the Department of Labor. (Petition, pages 20-21)

What has been said already in this Brief adequately demonstrates: 1) That the Court of Civil Appeals explicitly followed the ICC rulings in *Ex parte No. MC-2, supra*, and 2) that based on the relevant testimony and jury findings, Petitioner clearly fell within that class of employees defined as "helpers" by the ICC. Hence, there is no conflict of any nature between the Court of Civil Appeals' decision and the ICC. The only conflict is between what Petitioner claims *Ex parte No. MC-2, supra*, means and what the ICC and the courts say it means.

There can be no meaningful "conflict" between the interpretations of the Administrator of the Wage and Hour Division under FLSA regarding types of employees that are subject to the jurisdiction of the ICC and rulings of the ICC under section 204(a) of the Motor Carrier Act on that subject, because in this area, there is no concurrent jurisdiction. The ICC's power to regulate employees falling under the Motor Carrier Act is supreme. See *Morris v. McComb*, 332 U.S. 422, 437-38 (1947); see also *Shew v. Southland Corporation*, 370 F. 2d 376 (5th Cir. 1966), where the Department of Labor apparently concedes this point. The Administrator's language quoted on page 21 of the Petition represents merely an attempt to interpret an ICC ruling concerning employees over whom the Department of Labor has no jurisdiction. *Morris v. McComb, supra, Shew v. Southland Corporation, supra.* This Court long ago in *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947), recognized that the scope of the section 13(b)(1) exemption depended upon the ICC determinations and not upon the Department of Labor interpretations:

> Before examining further the new issue presented by the facts of this case, it is important to recognize that, by virtue of the unique provisions of §13(b)(1) of the Fair Labor Standards Act, we are *not* dealing with an exception to that Act which is to be measured by regulations which Congress has authorized to be made by the Administrator of the Wage and Hour Division, United States Department of Labor. Instead, we are dealing here with the interpretation of the scope of

the safety program of the Interstate Commerce Commission, under §204 of the Motor Carrier Act, which in turn is to be interpreted in the light of the regulations made by the Interstate Commerce Commission pursuant to that Act. Congress, in the Fair Labor Standards Act, does not attempt to impinge upon the scope of the Interstate Commerce Commission safety program. It accepts that program as expressive of a pre-existing congressionally approved project. Section 13(b)(1) of the Fair Labor Standards Act thus requires that we interpret the scope of §204 of the Motor Carrier Act in accordance with the purposes of the Motor Carrier Act and the regulations issued pursuant to it. It is only to the extent that the Interstate Commerce Commission does *not* have power to establish qualifications and maximum hours of service pursuant to said §204, that the subsequent Fair Labor Standards Act has been made applicable or its Administrator has been given congressional authority to act. This interpretation puts safety first, as did Congress. It limits the Administrator's authority to those "employees of motor carriers whose activities do not affect the safety of operation." 330 U.S. at 676-77.

* * * *

The fundamental and ever recurring difficulty with the Administrator's interpretation of the scope of § 7 of the Fair Labor Standards Act is that to the extent that he expands the jurisdiction of the Fair Labor Standards Act he must reduce the jurisdiction of the Commission under the Motor Carrier Act, whereas he has no authority to do so. 330 U.S. at 684.

Since the Court of Civil Appeals' decision only enforces the determination of the ICC in *Ex parte No. MC-2, supra*, there likewise can be no meaningful "conflict" between interpretations of the Wage and Hour Division Administrator and the lower court decision. Moreover, the instant de-

cision finds support in other "driver's helper" decisions. *Opelika Royal Crown Bottling Co. v. Goldberg*, 299 F. 2d 37 (5th Cir. 1962); *Walling v. Silver Fleet Motor Express, Inc.*, 67 F. Supp. 846 (W.D. Ky. 1946); *McLough v. Malten*, 137 N.Y.S. 2d 523 (Sup. Ct. 1954). (For this reason, there is no "unique" question involved in this case.)

D. *This Case Essentially Involves a Factual Dispute Concerning the Application of an Admittedly Correct Federal Administrative Standard.*

As this Court can readily perceive from a reading of the Petition, at best the present case involves the proper application of an admittedly correct federal administrative ruling, *viz, Ex parte No. MC-2, supra,* to a set of disputed facts. There are no constitutional questions raised, no problems of widespread application of a federal law, and no conflicts in decisions between the instant court and the federal courts or among federal courts. True, spurious issues concerning the propriety of rulings by an interested but non-jurisdictionally empowered federal agency and concerning the meaning of and effect to be given to Texas state procedural rules which resurrect "implied findings" in support of judgments have been raised. However, in the ultimate analysis, this case affects only Petitioner and whether or not, under the facts, he is entitled to $548.49 in overtime wages under section 7 of the FLSA.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 25, 1967

CERTIFICATE OF SERVICE

The undersigned, counsel of record herein for Respondent Texas Farm Products Company, does certify that service of the above and foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari was this day accomplished pursuant to Rule 33(1) of the Rules of this Court by depositing 1 copy of same in a United States Post Office mail box, with first class postage prepaid, by certified mail with return receipt requested, addressed to Graves, Dougherty, Gee, Hearon, Moody & Garwood, and 1 copy of same in a United States Post Office mail box, with first class postage prepaid, by certified mail with return receipt requested, addressed to Benton Musslewhite, counsel of record for Petitioner Aaron Williams, at their post office addresses of record herein.

May 25, 1967

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